

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Public) Application No. NG-0012.1
Alliance for Community Energy)
(ACE), Lincoln, seeking)
additional authority as a) ORDER DENYING APPLICATION
Competitive Natural Gas Provider)
to serve the entire state of)
Nebraska.) Entered: March 7, 2006

BY THE COMMISSION:

On November 4, 2005, the Public Alliance for Community Energy (ACE) filed an application seeking additional authority as a competitive natural gas provider (CNGP) pursuant to *Neb. Rev. Stat. § 66-1849* (2004 Cum. Supp.) and Rule 009 of the Natural Gas and Pipeline Rules and Regulations, Title 291, Ch. 9. ACE previously received CNGP authority for the Kinder Morgan service area in Application No. NG-0012 on January 13, 2004.

Notice of the application was published in the *Daily Record*, Omaha, on November 8, 2005. On December 13, 2005, the Commission granted petitions for formal intervention filed by the Public Advocate, Aquila Energy, Inc. d/b/a Aquila Networks (Aquila), and Cornerstone Energy, Inc. (Cornerstone). Hearing on this matter was held on January 30, 2006.

E V I D E N C E

ACE presented testimony from Richard Duxbury, Ronald Haase, and Claudia Stetler. Copies of their written testimony were entered into the record as Exhibits 101, 103, and 104 respectively.

Richard Duxbury is general counsel and former executive director for Nebraska Municipal Power Pool (NMPP) and ACE. Mr. Duxbury testified that ACE was created in 1998 pursuant to the Interlocal Cooperation Act to participate in what is currently known as Kinder Morgan's Choice Gas program. ACE currently serves approximately 23,800 customers and is made up of 66 communities and one public power district. ACE's application was entered into the record as Exhibit 102 and contained a list of ACE's members. Mr. Duxbury further testified that ACE's managerial, technical and financial capabilities have only strengthened since it initially received CNGP authority.

NMPP is a nonprofit corporation containing organizations that provide electric supply and natural gas supply to their members. NMPP and ACE share legal, accounting, administrative, and certain managerial services. Employees providing those services are employees of NMPP.

Ronald Haase, chief financial officer for ACE, testified on behalf of the applicant. He is responsible for all the financial aspects of ACE's activities and testified that ACE has demonstrated the financial requirements for CNGP authority statewide.

Claudia Stetler, chief operating officer for ACE, testified on behalf of the applicant that ACE has technical and managerial qualifications necessary for statewide CNGP authority. Although, Ms. Stetler is a full-time employee of NMPP, she is assigned to ACE. Currently, Midwest United Energy is the wholesale gas supplier for ACE on the Kinder Morgan system. She further testified that ACE has received inquiries from customers outside the Kinder Morgan system about receiving service from ACE.

Glenn Dee, regulatory manager of Colorado and Nebraska testified on behalf of Aquila. Mr. Dee's prefiled testimony was entered into the record as Exhibit 201 with the exception of page 1, lines 12 through 19, which were stricken. Mr. Dee testified that ACE's filing was premature in light of the fact that Aquila is not currently offering a supplier choice program. He further stated that government entities like ACE should not be allowed to compete with private enterprise outside of their own membership. Specifically, he pointed to legal protections available to municipalities that are not available to private enterprises. Mr. Dee also expressed concern that cross-subsidization between NMPP and ACE and the individual ACE members would provide ACE with an unfair competitive advantage.

In addition to the above-mentioned evidence, the direct testimony of Steven Stovall, staff accountant for the Commission, was entered into the record as Exhibit 3. He reviewed the financial information filed by ACE and concluded that ACE satisfied the information filing requirements and provided evidence of adequate financial resources.

O P I N I O N A N D F I N D I N G S

The Commission's jurisdiction arises pursuant to *Neb. Rev. Stat.* §§ 66-1848 to 66-1849 (2004 Cum. Supp.). Section 66-1849 establishes the standard for evaluating applications for authority as a competitive natural gas provider:

In an application for certification, a competitive natural gas provider or aggregator shall reasonably demonstrate managerial, technical, and financial capability sufficient to obtain and deliver the services such provider or aggregator proposes to offer.

Prior to reaching the question of whether ACE has met the statutory standard for CNGP authority, the Commission must first address the threshold issue of whether ACE, has the legal authority to act as a CNGP statewide. ACE is a collection of 66 communities and one public power district formed through inter-local agreements pursuant to the Interlocal Cooperation Act¹ (ICA). The ICA was intended to:

Permit local governmental units to make the most efficient use of their taxing authority and other powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.²

The ICA permits public agencies to "contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which at least one of the public agencies entering into the contract is authorized by law to perform."³

The powers and authority of an interlocal derive from the underlying powers of the entities that form it. *Neb. Op. Atty. Gen. No. 03026* (2003). The ICA "does not enhance the authority or power of government subdivisions, nor does it curtail or prohibit the legislative or administrative authority of the governmental subdivisions." *Neb. Op. Atty. Gen. No. 97011* (1997). See also *Gallagher v. City of Omaha*, 189 Neb. 598, 204

¹ *Neb. Rev. Stat.* § 13-801 et seq. (2004 Cum. Supp.).

² § 13-802.

³ § 13-807.

N.W.2d 157 (1973). However, if one or more members have greater powers than other members, the greater powers may be utilized by the interlocal group as a whole. *Neb. Rev. Stat. § 13-804* (2006). *Neb. Op. Atty. Gen. No. 97011* (1997).

Therefore, in order for ACE to have the authority to act as a CNGP statewide, at least one of its members must have that power.

[A] municipal corporation possesses and can exercise these powers only: (1) those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable.⁴

"Political subdivisions are purely entities of legislative creation. They do not exist independent of some action of the legislative department of government bringing them into being. All the powers that they can possess are derived from the creator. Unlike natural persons they can exercise no power except such as has been delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power."⁵

Where doubt exists as to whether or not a political subdivision has the power to perform certain acts or functions, such doubt must be resolved against the grant of power.⁶ Legislative charters "are construed with a greater degree of strictness than ordinary civil statutes, and the rule in Nebraska is that they shall be strictly construed. Their authority to perform municipal acts will not be extended beyond the plain import of the language of the charter."⁷

ACE relies on *Neb. Rev. Stat. §§ 16-673 through 16-675 and 17-901 through 17-905* for the proposition that cities of the first and second class and villages have the express authority for the provision of natural gas supply.⁸

⁴ *In re Application of Lincoln Electric System*, 265 Neb. 70, 81, 655 N.W.2d 363, 372 (2003), citing *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 69-70, 189 N.W. 643, 650 (1922).

⁵ *Nebraska League of Savings and Loan Associations v. Johnson*, 215 Neb. 19, 337 N.W.2d 114 (1983).

⁶ *Nelson-Johnston & Doudna v. Metropolitan Utilities District*, 137 Neb. 871, 291 N.W. 558 (1940).

⁷ *Metropolitan Utilities District v. City of Omaha*, 171 Neb. 609, 107 N.W.2d 397 (1961).

⁸ Post-Hearing Brief of the Public Alliance for Community Energy, pages 7-8.

While this may be true, the express authority for the provision of natural gas supply does not extend beyond the power to provide natural gas to a city's own residents. For example, the mayor and city council of a city of the first class may make contracts with and authorize any person, company, or association to erect a gas works, power plant, electric or other light works, heating plant, or waterworks in such city and give such persons, company, or association the privilege of furnishing water, lights, power, or heat for the streets, lanes, alleys, and public places and property **of such city and its inhabitants...**⁹

The mayor or city council of a city of the first class also has the power to

purchase or provide for, establish, construct, extend, enlarge, maintain, operate, and regulate **for the city** any such waterworks, gas works, power plant, including an electrical distribution facility, electric or other light works, or heating plant, or to condemn and appropriate, **for the use of the city**, waterworks, gas works, power plant, including an electrical distribution facility, electric or other light works, or heating plant.¹⁰

Additionally, no express authorization exists permitting cities of the second class or villages to provide natural gas service outside their jurisdictional limits. When considering a similar question as applied to an interlocal economic development board, the Attorney General determined that the board was permitted to conduct its efforts outside of the members' jurisdictions. However, the municipality members had **express authorization by statute** to conduct economic development activities without regard to geographic jurisdiction. Neb. Op. Atty. Gen. No. 97011 (1997) (emphasis added). Pursuant to the ICA, ACE must demonstrate that at least one of its members has the statutory authority to offer competitive natural gas service outside of its corporate limits.

No such statutory authority exists for any of ACE's members with respect to the provision of statewide competitive natural gas service.

At present, pursuant to the authority granted in Application No. NG-0012, ACE provides competitive natural gas service within the Kinder Morgan service area as part of the Kinder Morgan Choice Program. Such activity is distinguishable from

⁹ Neb. Rev. Stat. § 16-673 (Reissue 1997) (emphasis added).

¹⁰ Neb. Rev. Stat. § 16-674 (2004 Cum. Supp.) (emphasis added).

the present application. In order to address the issue, the Commission takes administrative notice of Application No. NG-0012 and of Kinder Morgan's tariff currently on file with the Commission.

At the time LB 790 (2003) was passed, ACE was providing CNGP service on the Kinder Morgan system. There is no indication that the Legislature intended to stop that activity. ACE's CNGP application in Application No. NG-0012 was processed by modified procedure once the parties signed a stipulation asking the Commission to enter an order granting the application but restricting authority to Kinder Morgan's system. Therefore, the issue of whether ACE possessed the legal authority to operate as a statewide CNGP was never addressed. Some differences exist between the Kinder Morgan service area and the territorial jurisdiction of ACE's membership. However, as a practical matter, ACE must be able to serve any of the customers on the Kinder Morgan system in order to participate in the Kinder Morgan Choice Program. The Choice Program has no mechanism to allow a CNGP on its system to limit which customers it can serve. We therefore find that ACE's current authority is distinguishable from the statewide CNGP authority sought in its application.

For the above-mentioned reasons, ACE's application should be denied as ACE lacks the statutory authority to provide statewide CNGP service. Due to the Commission's finding, the Commission does not reach the question of whether ACE has demonstrated the managerial, technical, and financial capability sufficient to obtain and deliver the services such provider or aggregator proposes to offer.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Public Alliance for Community Energy's application seeking additional authority as a competitive natural gas provider is denied.

MADE AND ENTERED at Lincoln, Nebraska, this 7th day of
March, 2006.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director